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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,
Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIAE CITY OF OAK PARK, MICHIGAN

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BRIEF FOR AMICUS CURIAE CITY OF OAK PARK, MICHIGAN

INTEREST OF AMICUS CURIAE

The City of Oak Park, a Michigan municipal corporation, is a community with a population of approximately 36,762 (1970 Census) bordering the northwest boundary of the City of Detroit, Michigan. On

August 6, 1973 the City Council for the City of Oak Park passed Ordinance No. 0-73-24 (Code of Ordinances, City of Oak Park, Michigan Section 3.4) which ordinance regulates the use of signs in connection with single family and two-family dwellings. The Oak Park ordinance excludes all signs with certain exceptions and thus the form and thrust of the Oak Park ordinance are similar to those of the Willingboro, New Jersey ordinance at issue in the present case. Under Oak Park Ordinance No. 0-73-24 the placement of "for sale" or "sold" signs in single family and two family residential zoning districts is unlawful. A copy of Oak Park Ordinance No. 0-73-24 is attached as Appendix A to this Brief.

The Oak Park ordinance was passed in part as a direct response to evidence that "blockbusting" tactics were being employed by some area realtors in the City of Oak Park. The Council found that a proliferation of "for sale" and "sold" signs was an integral part of blockbusting tactics and that the signs constituted highly visible symbols that the character of the City was rapidly changing. To hinder the efforts of blockbusters and to remove a major source of fear of rapid neighborhood deterioration which the Council found was engendering a desire in many white homeowners to sell in panic and leave the City, the City Council banned the use of "for sale" and "sold" signs.

Aside from a few initial complaints by realtors the Oak Park Ordinance has not been seriously questioned nor decried. Conversely, the general community reaction has been favorable and property turnover and integration continue in an orderly manner beneficial to the welfare of the entire community.

Since the Oak Park ordinance bears such similarity to the Willingboro ordinance and since the Oak Park City Council at the time of the ordinance's passage shared many of the concerns experienced and envisioned by the Willingboro Township Council, the City of Oak Park respectively submits this *amicus curiae* brief in support of the position of the Respondents that the Township of Willingboro Ordinance No. 5-1974 is a valid and constitutional exercise of municipal police powers.

This brief is sponsored by Burton R. Shifman, P.C., the authorized City Attorney of the City of Oak Park, Michigan, a Michigan municipal corporation, and thus, pursuant to United States Supreme Court Rule 42, paragraph 4 consent of the parties to the filing of this *amicus curiae* brief is not required.

SUMMARY OF ARGUMENT

Commercial advertising is not unprotected by the First Amendment, but the Petitioners' asserted First Amendment rights involve merely a proposal of a commercial transaction which is not among that type of speech the restraint of which must be justified by a substantial governmental interest.

The governmental interest in prohibiting panic selling is, nevertheless, substantial; and the ordinance in question, a legitimate exercise of the police power, seeks removal by the only possible effective means of highly visible symbols, which, in the judgment of the legislative body, contribute significantly to the fear psychology upon which panic selling thrives. The cause and effect

relationship between signs and panic selling is not only complex but involves the assessment of local conditions. In the latter regard the judgment of the legislative body should not be overturned unless it is manifestly improper.

The restrictions are aimed not at the content of the advertising but rather at the very presence of the signs, and given the fact that ample alternative means of communicating the advertisement exist, the ordinance may be justified as a legitimate time, place, and manner restriction on First Amendment freedoms.

The balancing of competing interests is an approach which considers many of the factors viewed in the application of a time, place, manner test. In this regard, the governmental interest in removing a cause of panic selling which may have devastating effects on the stability and general well being of the community clearly outweighs the private interest in choosing the means of commerical solicitation.

The ordinance also withstands equal protection and due process challenges since it is not arbitrary or capricious, makes no discrimination on its face, and does not have an inevitable discriminatory effect which is evidenced on the record. In any event, the traditional standards by which due process and equal protection claims are judged are less stringent than the various First Amendment tests utilized by this Court, and therefore the resolution of these latter claims will be subsumed by the decision on the First Amendment issues.

ARGUMENT

I

THE WILLINGBORO ORDINANCE BANNING "FOR SALE" AND "SOLD" SIGNS DOES NOT VIOLATE PETITIONERS' ASSERTED RIGHTS OF FREE SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A.

THE NATURE OF THE COMMERCIAL ADVERTISING IN THIS CASE DISTINGUISHES THE FREE SPEECH RIGHTS ASSERTED FROM THOSE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

Petitioners assert correctly that, in the classic case, a prior restraint on speech may be justified only by a governmental showing of a paramount interest (Brief for Petitioners, p. 18). Petitioners also contend correctly that *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ___ US ___, 48 LEd2d 346, 96 S.Ct. 1817 (1976), forecloses the argument that commercial speech enjoys no protection under the First Amendment. However, this Court did in that case acknowledge categories of commercial speech which could be distinguished on the basis of content, ___ US ___, 48 LEd2d at 358, and found that commercial speech could still be differentiated from other forms of speech enjoying unlimited First Amendment protection:

> "There are common sense differences between speech that does 'no more than propose a commercial transaction' Pittsburgh Press Co. v.

> Pittsburgh Commission on Human Relations, 413 US at 385, 37 LEd2d 669, 93 S.Ct. 255, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the state, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." ___ US ___, 48 LEd2d at 364, fn 24.

The present case involves speech which merely suggests a commercial transaction and therefore when other circumstances are considered the protection to which it is entitled may be of a "different degree."

A second factor distinguishing the present ordinance from classic prior restraint situations is that the prohibition is not total. The proscription is very narrow; only "for sale" and "sold" signs are prohibited; and thus the incidental effect on speech is minimized. Accordingly, the instant prior restraint is not analogous to the total prohibitions struck down in such cases as *Bigelow v. Virginia*, 421 US 809 (1975) and *Erznoznik v. City of Jacksonville*, 422 US 205 (1975).

The applicability of the prior restraints doctrine may be further distinguished on a theoretical basis. As this Court stated in *Southeastern Promotions Limited v. Conrad*, 420 US 546 (1975):

> "The presumption against the prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of

> speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between iegitimate and illegitimate speech is so finely drawn that the risks of free-wheeling censorship are formidable. See *Speiser v. Randell*, 357 US 513, 2 LEd2d 1460, 78 S.Ct. 1332 (1958)" 420 US at 558-559. (emphasis by the Court)

The evil of free-wheeling censorship is not present in the instant case since the precise nature of the communication is known beforehand. Only that form of communication is incidentally infringed upon and there is no danger that other constitutionally permissible speech would be swept into the ordinance's prohibition. cf. *Erznoznik, supra*.

Additionally, this case can be said to fall into the generic concept established in such cases as *Pittsburgh Press Company v. Human Relations Commission*, 413 US 376 (1973) and *United States v. Hunter*, 459 F2d 205 (4th. Cir.) *cert. den.* 409 US 934 (1972), both of which upheld, against First Amendment claims, the constitutionality of statutes prohibiting illegal communication. In this regard the Court of Appeals for the Seventh Circuit noted in *Barrick Realty, Inc. v. City of Gary, Indiana*, 491 F2d 161, 163 (7th Cir. 1974):

> "The reasoning is not applicable with full force here, because 'for sale' signs are forbidden even if they do not contain an explicit reference to race analogous to the sex designations in *Pittsburgh Press*. However, the effect of 'for sale' signs was inconsistent with public policy as expressed in the Gary Civil Rights Ordinance . . ."

So too, the ordinance in the present case seeks to remove a cause of a condition detrimental to the general welfare of the community and in this sense the ordinance prohibits a definite evil.

To distinguish the *Barrick Realty* case as the District Court did in the present case by arguing that in Gary, Indiana the damage was already occurring (Petition for Certiorari, App. B p. 4) is as the Court of Appeals noted: " . . . an exaltation of form over substance." *Linmark Associates, Inc. v. Township of Willingboro*, 535 F2d 786, 800 (3rd Cir. 1976). This approach closes the barn door after the horses have escaped and ignores the example of such constitutional ordinances as 42 USC §3604(e) (Federal Fair Housing Act) which proscribe mere attempts to incite "white flight".

Thus, the present ordinance is distinguishable from the typical instances of prior restraints on speech which this Court has held invalid. These several differentiating factors, when coupled with the facts that 1) real estate advertising is "hardy" and 2) the regulation does not chill other forms of commercial real estate advertising, place "for sale" and "sold" signs in that category of commercial speech to which this Court recognized in *Virginia State Board of Pharmacy, supra* "the prohibition against prior restraints" may be "inapplicable". ___ US ___, 48 LEd2d at 364, fn 24. Consequently, the contravening governmental interest need not be as fundamental or compelling as in the usual case and the test to be applied should be one akin to requiring a showing of a reasonable and rational relationship of the means to the ends sought to be accomplished. *McGowan v. Maryland*, 366 US 420, 425-428 (1961).

B.

THE WILLINGBORO ORDINANCE IS A LEGITIMATE TIME, PLACE AND MANNER REGULATION OF PETITIONERS' ASSERTED FIRST AMENDMENT INTERESTS.

The time, place, manner test, if it may be so characterized, was carefully explicated in *United States v. O'Brien*, 391 US 367 (1968), and has been recently recognized in *Virginia State Board of Pharmacy, supra*, and *Erznoznik v. City of Jacksonville, supra*. This test or approach may be distinguished in certain regards from the doctrines of cases such as *Dennis v. United States*, 183 F2d 210 (2nd Cir. 1950) aff'd 341 US 494 (1951) upon which Petitioners rely at p. 18 of their Brief. In writing for this Court, then Chief Justice Warren explains this test as follows:

> " . . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 US at 377.

These four factors are discussed individually in the following sections.

1. The Regulation Is Within The Constitutional Power Of The Government.

The ordinance in question is essentially an exercise of the police power of the township legislative body. This

power is delegated to the municipality and its legislative body by the state and embraces:

> " . . . the promotion of the public convenience or the general prosperity as well as the public safety, health and morals." 6 McQuillin, *Municipal Corporations* (3rd ed. 1969) §24.08 p. 483-484.

As the District Court recognized, legislative enactments are presumptively valid (Petition for Certiorari, App B p. 6) and there can be no real doubt that the township has the power to legislate in this area. See also: *Village of Belle Terre v. Borass*, 416 US 1, 32-33 (1974) and Hayes, *The Constitutionality of a Municipal Ordinance Prohibiting "For Sale", "Sold" or "Open" Signs to Prevent Blockbusting*, 14 St. Louis University L. J. 686, 689-691 (1970).

The District Court found (Petition for Certiorari, App B p. 6) and Petitioners' contend (Brief for Petitioners p. 33) that the ordinance is invalid due to an allegedly improper motivation on the part of the Willingboro council. This approach ignores the well settled doctrine that it is the demonstrable effect and not the legislative motivation that is considered in testing an ordinance's constitutionality.

In *United States v. O'Brien, supra*, this Court states:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:
>
> 'The decisions of this Court from the beginning lend no support whatever to the

> assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' McCray v. United States, 195 US 27, 56, 49 LEd 78, 95, 24 S.Ct. 69 (1904)". 391 US at 383.

Neither, should the test of constitutionality center entirely on the effectiveness of the ordinance as Petitioners contend (Brief for Petitioners, p. 24). In *James v. Strange*, 407 US 128, 133-134 (1972) this Court opines:

> "Our task, however, is not to weigh the statutes' effectiveness but its constitutionality. Whether the returns under the statute justify the expense, time, and efforts of state officials is for the on-going supervision of the legislative branch."

Furthermore, the cause and effect relationship between "for sale" and "sold" signs and panic selling is a highly complex matter which will depend in large part on gauging the psychological climate of the geographical area as exhibited by the opinions and reactions of a majority of the residents. The Willingboro council did not act precipitously and the judiciary should not be quick to substitute its judgment in such complex matters, unique to each given community.

These principles, coupled with the well settled presumption of validity which legislative enactments enjoy serves to foreclose any argument that the Willingboro ordinance should fall because of improper motives on behalf of the Township council or lack of

effectiveness of the ordinance. The burden is upon Petitioners to demonstrate an impermissible effect and there is no evidence on the record to support the contention that the effect of the ordinance was to promote racial imbalance by excluding minorities. The Township's Exhibit D-1 (Petition for Certiorari, App A at 36; U.S.C.A. Joint Appendix at 128A, Brief for Petitioners p. 35) demonstrates that as of 1970 Willingboro Township was an integrated community and that as of 1973 the percentage of nonwhite population had risen. This exhibit can stand for nothing more. Petitioners and the District Court below would apparently dictate what the white-nonwhite ratio should be, but they have failed to demonstrate from evidence on the record that the sign ordinance has prevented or affected the attainment of their desired ratio in any manner.

Finally, the District Court and Petitioners are completely wrong in attaching a stigma to a desire to achieve neighborhood stability by maintaining a reasonable balance. Minority groups have the right not to have to move from one ghetto to another. As the Court of Appeals below noted, national policy favors racial balance. *Linmark Associates, Inc., supra*, 535 F2d at 797 fn 14.

2. The Regulation Furthers An Important Governmental Interest Which Cannot Be Achieved Through Less Burdensome Means.

a. The Government has a substantial interest in discouraging panic selling and its causes.

Panic selling is a well recognized phenomena and its effects are deleterious to the best interests of any

community. The District Court in *Barrick Realty, Inc. v. City of Gary, Indiana*, 354 F. Supp. 126 (ND Ind. 1973) defined the problem of panic selling:

> " 'Blockbusting', or 'panic peddling', is not the same as panic selling. Blockbusting refers to the practice of directly inducing or persuading an individual to sell his home by representations as to the entry into his neighborhood of blacks or other minority groups. Panic selling is a broader problem which, although it may be prompted by blockbusting practices, does not depend on direct inducements or face to face contact between people. Panic selling occurs when a resident who is otherwise disposed to remain in a neighborhood succumbs to any one or more of the number of pressures to move out when it appears that a minority racial group is beginning to enter."

This definition was elaborated upon in Jung, *Control of Panic Selling by Regulation of "For Sale" Signs*, 10 Urban Law Annual 323, 324 (1975):

> "It is apparent that the inducement of panic selling is a necessary element of blockbusting in that panic selling, since it can occur without the intervention of blockbusters, is a much broader problem than blockbusting."

That blockbusting itself is an evil which the government may legitimately prohibit is beyond contention. 42 USC §3604(e) specifically prohibits blockbusting activities and the constitutionality of this statute has been upheld as against First Amendment claims in both *United States v. Bob Lawrence Realty, Inc.*, 474 F2d 115 (5th Cir.) *cert den* 414 US 826 (1973)

and in *United States v. Mintzes*, 304 F. Supp. 1305 (D Md. 1969). Both blockbusting and panic selling affect the very fiber of social well being, and the ability of a municipality to inhibit the spread of these evils and their deleterious effects by removing a significant root cause is therefore undoubtedly of utmost importance to the community at large.

The cause and effect relationship between these signs and panic selling has been recognized in the past. It seems to be well accepted, for example, that "for sale" and "sold" signs are a tool of blockbusters. See Bisceglia, *Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses*, 22 DePaul L. Rev. 818, 820 (1973), and Note, *Blockbusting*, 59 Georgetown L. J. 170, 173 (1970). The role of "for sale" and "sold" signs in panic selling was recognized by the court in *Barrick Realty, Inc. v. City of Gary, Indiana*, 354 F.Supp. at 135-136. Indeed, it has been suggested that:

> "Conventional legislative attempts to halt blockbusting have not dealt directly with the problem of panic seliing but have focused instead upon regulation of the individual blockbuster. The emphasis upon restricting would be blockbuster's representations, solicitations and conduct reveals the basic flaw in conventional anti-blockbusting legislation, which rests on the philosophically naive premise that blockbusting can be halted by stopping blockbusters. The premise dictates regulation of the blockbuster as the means of controlling, albeit indirectly, neighborhood destabilization and panic selling and is partly responsible for the limitation of statutory prohibitions to only the most overt blockbusting violations.

* * * *

> "Close examination of the Gary ordinance reveals that it is more than a different approach to panic selling because it implicitly recognizes that the broader problem of panic selling and neighborhood destabilization can be controlled only by decreasing the fears of white residents. The ordinance deals directly with these critical problems by removing a significant source of residential insecurity — the proliferation of 'for sale' signs." Jung, *Control of Panic Selling by Regulation of "For Sale" Signs*, 10 Urban Law Annual 322, 324-328 (1975).

See also *Brown v. State Realty Co.*, 304 F.Supp. 1236, 1237-1238 (ND Ga. 1969) for judicial factual findings that the existence of "for sale" and "sold" signs contribute to panic selling.

The Willingboro ordinance prohibits demonstrable tools of the blockbuster and causes of panic selling. Accordingly, the evil is not an "undifferentiated fear or apprehension", *Tinker v. Des Moines*, 393 US 503, 508 (1969). The evil exists as an ugly fact of life which must not be ignored but combatted promptly and effectively.

That a panic situation had not come into fruition in Willingboro should not be in any manner conclusive. As the Court of Appeals below noted in this case, *Linmark Associates, Inc., supra*, 535 F2d at 799-800, the purpose of the ordinance was to nip the panic selling in the bud and it would be against the public interest to allow the deterioration to take place before it might be controlled.

In any event the record below amply supports the existence of a panic selling climate and the opinion of many witnesses at the trial was that the ordinance

lessened this psychological feeling throughout the community. See, for example, the testimony of Donald Evans at J.A. pp 162a-163a, William Kerns J.A. pp 191a-192a, Kevin Connally J.A. p 220a, Val Gladfelter J.A. p 234a, Alexander J.A. p 240a and Reverend Earnest Shaw Lyght J.A. p 250a. The judgment of the body closely attuned to local conditions and psychological situations should not be second guessed by the judiciary when the statute is otherwise constitutional.

Petitioners complain that the desired effect of the ordinance is accomplished by keeping the public ignorant and cites *Bigelow v. Virginia, supra*, for the proposition that such means are impermissible. (Brief for Petitioners, pp 14-15). This argument ignores the fact that the prohibition in this case is not total as was the advertising ban in *Bigelow*. Alternatives of gaining the information still exist (as Petitioners admit — Brief of Petitioners, p 24). The ordinance does not stop all channels of communication but does remove the panic element from the communicative and educative process. With the constant reminder of the signs, community residents are goaded into action and do not seek out alternative and more rational means of assessing the situation.

The evidence on the record as well as judicial history and the opinion of commentators supports the contention that panic selling is a major social evil and "for sale" and "sold" signs contribute to this social ill. In any event, so long as some rational and reasonable relation exists between the evil and the means sought to prevent it the enactment of the legislation is entitled to a presumption of validity. 6 McQuillin *Municipal Corporations, supra*, §24.09 *passim* pp 484-492. The language referring to

Congress in *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 585 (D.C. 1971) aff'd *sub nom Capital Broadcasting Co. v. Kleindienst*, 405 US 1000 (1972) applies equally well to the Willingboro Township council:

> "Finally, Congress is entitled to a presumption 'that if any state of facts might be supposed that would support its action, those facts must be presumed to exist.' International Ass'n. of Machine and A. Workers v. National Mediation Board, 138 US App D.C. 96, 425 F2d 527, 540 (1970)."

b. The means adopted are sufficiently narrow and no adequate alternative means exist to control "For Sale" and "Sold" signs and their contribution to panic selling.

Assuming that the signs are a significant cause of panic selling there can be no question that banning the signs is the most narrow and effective manner of ensuring that they do not continue to have this effect while at the same time ensuring that not all real estate advertising or other forms of protected expression be curtailed by the statute.

Petitioners' suggestion (Brief for Petitioners pp 22-23) that the "fear psychology" of panic selling may be avoided by a program of education is overly optimistic. Even assuming that the Township had the means and resources to launch a massive educational campaign there is no guarantee that such a rational approach could eradicate what is essentially an irrational reaction. Moreover, such a program would undoubtedly consume a great deal of time, and before root causes could be

weeded out the damage would in probability have occurred. Finally, the basic weakness of any educational program is that its commands and directives are at best precatory. No means exist to enforce "good ideas" and such enforcement would be overly paternalistic in any event.

Neighborhood associations would be another approach to the problem but these associations have no enforcement powers and are limited solely to educative functions of dubious value.

Real estate licensing boards or real estate codes of ethics are often totally ineffective to control the action of realtors since membership is often voluntary and not a prerequisite to doing business. See Note *Blockbusting*, 59 Georgetown L.J. 170, 171-172 (1970). In any event, licensing boards and real estate associations will not apply to land speculators who will often prey on the panic sellers.

Human rights commissions have no enforcement powers and as Witherspoon notes in *Civil Rights Policy in the Federal System: Proposals for a Better Use of the Administrative Process*, 74 Yale L. J. 1171, 1191 (1965) complaints to human rights commissions are few and far between on account of lack of knowledge of the existence of these facilities, lack of confidence in the commissions, and general aloofness of such commissions.

Criminal penalties to control overt encouragement of panic selling and blockbusting are inadequate because of proof difficulties and lack of effective deterrence resulting from the fact that fines and penalties do not compare with the profits available to a person actively engaged in blockbusting or encouraging panic selling. Furthermore,

traditional anti-blockbusting statutes such as 42 USC §3604(e) prohibit only practices and patterns of illicit representations and typically do not prohibit "for sale" signs which independent of any overt blockbusting tactics may contribute to panic selling.

It is thus apparent that the prohibition of "for sale" and "sold" signs is the least expensive and most efficient and effective manner of removing a significant cause of panic selling. The present case is, therefore, distinguishable from *Nebraska Press Association v. Stuart*, ___ US ___, 49 LEd2d 683 (1976) in which the prior restraint was held invalid due in large part to the fact that adequate alternative means existed to control the problem and thus vindicate both competing interests.

3. The Governmental Interest Is Unrelated To The Suppression Of Free Expression.

The purpose of the ordinance is not to ban notice of the commercial transaction which a "for sale" sign proposes.[1] If this were the case the ordinance would have to restrict the other available means of advertising. Rather, the ordinance seeks to prohibit a commercial activity which in situations such as existed at the time of the passage of the Willingboro ordinance contributed to a fear psychology culminating in panic selling. *It is thus the noncommunicative impact of the sign which the ordinance seeks to prohibit*. It is not the message of the signs but their very presence which is symbolic to the viewer of the idea that something is wrong with the

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[1] In this regard it is interesting to note that a "sold" sign proposes no transaction. It would be anomalous, however, to ban only "sold" signs since this would create the impression that the neighborhood was so undesirable that owners could not sell their homes.

community. True, as Petitioners suggest, homeowners may still obtain information regarding the real estate market by other means (Brief for Petitioners p 24) but in this regard the signs are similar to the broadcasting prohibited in *Kovacs v. Cooper*, 336 US 77 (1949) in that the viewers of the signs are captive to the presence of the signs. As the District Court noted in *Barrick Realty, supra*:

> "Many white residents desire to remain in changing neighborhoods provided they can be maintained on a stable integrated basis. The evils they fear most — crime, overcrowding, depressed property values and being left behind — need not come to pass if stability can be achieved. Steadily increasing number of 'for sale' signs tends, no less than overt blockbusting practices, to undermine any hope of such stability. Once this hope is lost and complete racial transformation appears inevitable, even those desiring to remain are virtually forced to sell. The challenged ordinance therefore removes a significant source of panic and selling pressure from those who wish to remain in a transitional neighborhood." 354 F. Supp. at 135.

The advertising message itself is not really the cause of concern but rather the presence and proliferation of signs giving rise to the appearance and belief of rapid turnover in the community. Thus, the prohibition is not directed to the content *per se* of the message.

4. Alternative Channels Of Communication Are Open To Petitioners.

It is apparent that an incidental restriction does occur on the commercial advertisement of real estate. By prohibiting the presence of the signs there can be no

other effect than the preclusion of that manner of commercial advertising. However, alternate avenues of communication such as newspaper advertisements, multiple listing services, and personal solicitation still exist. The fact that Petitioner Mellman testified that thirty (30%) percent of his inquiries were motivated by signs (Brief for Petitioner, p 27) cannot be converted into a contention that the banning of signs reduced his business by thirty (30%) percent. The restriction merely entails a little more effort by brokers and perhaps a time lag for sellers though no evidence was offered by Petitioners to this effect. Prospective buyers have more than adequate means of ascertaining what is available on the market through newspaper ads and brokerage listings which would not in the case of purchasers involve a contract. As to the general public it seems somewhat ludicrous to contend as Petitioners do (Brief for Petitioners, p 28) that in these days of high gasoline prices, driving around the entire town to see where the signs were would be cheaper or consume less time than consulting a broker or looking at the newspaper utilizing a map of the city.

On similar facts the Court of Appeals for the Seventh Circuit in *Barrick Realty, supra*, found that adequate alternative means existed. The court states:

> "Thus the ordinance does not make it unduly difficult to sell a house; it only makes it slightly more expensive to do so. Accordingly, the burden on property rights is small, and any effect on the right to travel is insignificant." 491 F2d at 164.

II.

THE GOVERNMENTAL INTEREST OUTWEIGHS PETITIONERS' ASSERTED FIRST AMENDMENT RIGHTS.

To determine the validity of a statute which restricts private rights this Court has in the past balanced the competing interests involved. *Rowan v. United States Post Office Department*, 397 US 728 (1970), *Bibb v. Navajo Freight Lines, Inc.*, 359 US 520 (1959), *NAACP v. Button*, 371 US 415 (1936). This Court in such a process has considered the same type of factors viewed in time, place, manner restriction cases, e.g. *Pell v. Procunier*, 417 US 817, 826-835 (1974).

In First Amendment cases in which this approach has been adopted this Court has been especially rigorous in requiring that the state act with "precision of regulation", *NAACP v. Button*, 371 US 415, 438, so as to ensure that personal rights and liberties are not stifled by overbroad laws. The present case, however, involves a very narrow proscription: only one type of commercial advertising is prohibited.

The forum of the free speech is a private property owner's front yard, the mode is a sign and the message either a proposal of a commercial transaction or a one word indication that one has taken place. Balanced against this private interest is a governmental interest in the prevention of "fear psychology" that may trigger a panic selling situation and consequent deterioration of the community. Implicit in the balancing question is the matter of the deference courts owe to the legislative branch in the area of the exercise of police powers for the betterment of the community.

Although the case of *Breard v. Alexandria*, 341 US 622 (1951) may be somewhat tainted by its reliance on the commercial speech approach expressed in *Valentine v. Chrestensen*, 316 US 52 (1942), still its balancing question is analogous to the one faced in this case. In *Breard* this Court felt the right to privacy was more important than a publisher's right to sell his publications in a manner his solicitors thought best. Signs also have been prohibited for aesthetic reasons (23 USC §131, Highway Beautification Act), and due to the nature of the "services" offered by the legal and medical professions this Court suggests that their advertising may be regulated. *Virginia Pharmacy Board, supra*, ___ US ___, 48 LEd2d 346, 365, fn 25.

The nature of the advertising interest and of the governmental interest have been discussed in section I of the Argument portion of this Brief. Given the relative importance of the interests and given the fact that ample alternative means exist to "get the message across", a statute which incidentally restricts means of solicitation should be allowed to continue to further the substantial interest of the legislature and the people.

III.

THE WILLINGBORO ORDINANCE VIOLATES NEITHER THE EQUAL PROTECTION NOR THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

The goal of achieving racial stability is not, as Petitioners seem to argue, equivalent to discriminating against racial minorities (Brief for Petitioners *passim* pp 33 through 37). The evidence upon which Petitioners rely,

Township's Exhibit D-1 (Petition for Certiorari, Appendix A at 36; U.S.C.A. Joint Appendix at 128A; Brief for Petitioners p 35) does not support their contention. This exhibit shows merely that as of 1973 the Township of Willingboro was fairly well integrated and even if evidence had been offered to the effect that the pace of integration had been slowed, such evidence would be more reasonably construed to mean that stability was being achieved rather than that minorities were being excluded.

The statute at hand makes no unconstitutional classification on its face since it applies equally to all classes of persons. Unless the " . . . inevitable effect of a statute on its face may render it unconstitutional", *United States v. O'Brien*, 391 US at 384, legislative motive is not a proper reason for holding a statute unconstitutional. Petitioners have offered no evidence showing that the statute has an inevitable discriminatory effect and, therefore, Petitioners have failed to undermine the presumptive validity of this statute.

The cases cited by Petitioners at page 35 of Brief for Petitioners are inapposite due to the fact that each of these cases involved either a statutory scheme which on its face discriminated against a class of persons or did so by its inevitable effect. Contentions of discrimination in those cases were supported by allegations and evidence as to the discriminatory effect of the statutory scheme or regulation. No such discriminatory classification is apparent on the face of the Willingboro ordinance and beyond Petitioners' and the District Court's surmise and contention, no evidence is on the record of discrimination against any class of persons.

It would seem more logical to contend that homeowners or realtors were being denied equal protection of the laws by the Willingboro ordinance.

In this regard the general test was expressed by this Court in *Patsone v. Pennsylvania*, 232 US 138, 144 (1914) as follows:

> "But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out . . . ."

Homeowners and realtors place the "for sale" and "sold" signs. No other class of persons does so. Discouragement of panic selling is a proper legislative objective and the means sought to accomplish this end are reasonably and rationally related to it. The ordinance therefore satisfies equal protection standards. See: *Chicago Real Estate Board v. City of Chicago*, 36 Ill. 2d 530, 224 NE2d 793 (1967) upholding a classification singling out realtors.

In regard to due process claims it is well settled that a proper exercise of the police power is due process. See 6 McQuillin *Municipal Corporations*, *supra*, §24.28 pp 531-532. In determining whether an exercise of police power is proper the following test applies:

> " . . . the guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 US 502, 525 (1934).

See also *Village of Belle Terre v. Borass*, 416 US 1, 8 (1974). So expressed it is apparent that the due process test is less demanding than the justifications traditionally required by this Court to restrict First Amendment

freedoms. In view of the fact that this case does involve First Amendment claims it is apparent that if the ordinance withstands these First Amendment claims it will *a fortiori* withstand due process challenges. Conversely, if the ordinance falls to the First Amendment challenge, the due process claim becomes moot. Consequently, no detailed analysis of the due process test is necessary.

CONCLUSION

For the reasons stated, *Amicus Curiae*, City of Oak Park, Michigan, respectfully requests this Court to uphold the judgment of the Court of Appeals.

Respectfully submitted,

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Dated: January 11, 1977

APPENDIX A

CITY OF OAK PARK
MICHIGAN

ORDINANCE NO. 0-73-24

An Ordinance to amend the code of Ordinances of the City of Oak Park by adding to Chapter 3, Advertising, Article I, New Section 3.4, and repealing section 5.12(b)(2)(d) of Appendix A, zoning, and repealing sections 36-103 through 36-105, Chapter 36, signs, for the purpose of regulating the use of signs in connection with single family dwellings and two-family dwellings.

The City of Oak Park Ordains:

Section 1. The Code of Ordinances of the City of Oak Park is hereby amended by adding a new Section 3.4 to Chapter 3, Advertising, Article I, which shall be designated as follows:

Section 3.4(a). It shall be unlawful for any person to construct, maintain, place, install or permit to be constructed, maintained, placed or installed any sign of any shape, size or form on property or buildings zoned for, used, occupied, built or constructed as single family or two-family dwellings.

For the purposes of this Section, the term "sign" is hereby defined to mean any structure, and all parts composing the same, together with frame, background or supports therefor, which are used for advertising or display purposes, or any

flags. bunting or material used for display or advertising purposes. including. but not limited to. placards. cards. structures or areas. posters and marquees of a temporary or permanent nature.

Section 3.4(b) – Exempt Signs. The foll›wing signs shall be exempt from the provisions of this Section:

(I) Signs advertising "garage sales" as permitted under Section 5.12(B)(2)(H)(IV) of this Chapter.

(II) The display of the American flag, the flag of the State of Michigan displayed at any time, or any other commemorative or national flag for display on holidays.

(III) Any sign or device not to exceed one sqare foot in area containing the street number, street name, name or names of occupants or a combination thereof.

(IV) Signs incident to those uses permissible on appeal under Section 5.13(1) where the Board of Zoning Appeals specifically finds that such signs would not be contrary to the spirit and intent of this ordinance.

(V) Any sign, not to exceed one (1) square foot in area, containing language of a nature which forbids trespassing, soliciting, dumping, walking on grass or picking flowers; or warning of dangerous conditions including, but not limited to, beware of dog or helping hand insignia for school children.

(VI) Any sign posted or placed by Order of any Municipal, County, State or Federal statutory authority or Court Order, or by any public utility.

Section 3.4(c). All signs as defined under this Section which were completely erected or in use on the effective date of this ordinance shall be exempt from the provisions for a period of ninety (90) days from the effective date of this ordinance, and thereafter shall be subject to its provisions.

Section 2. Sections 36-103 through 36-105 of Chapter 36 of the Code of Ordinances of the City of Oak Park, dealing with the location of signs in residential districts, are hereby repealed.

Section 3. Section 5.12(b)(2)(d) of Article IV, Appendix A of the Code of Ordinances of the City of Oak Park, dealing with the accessory use of non-illuminated signs, is hereby repealed.

Section 4. Should any Section, clause or paragraph be declared by any Court of competent jurisdiction to be invalid, the same will not affect the validity of the ordinance as a whole or a part thereof other than the part declared to be invalid.

Section 5. All ordinances in conflict with the provisions of this ordinance are, to the extent of such conflict, hereby repealed.

Section 6. This ordinance shall become effective ten (10) days from the date of its passage and shall be published as required by the Charter of the City of Oak Park.

Made, Passed and Adopted by the Council of the City of Oak Park on this 6th day of August, 1973.

Kathleen M. Callan, City Clerk
David H. Shepherd, Mayor

I. Kathleen M. Callan, duly authorized Clerk of the City of Oak Park, Michigan, do hereby certify that the foregoing ordinance was adopted by the Council of the City of Oak Park at its Regular Meeting on August 6, 1973.

/s/ Kathleen M. Callan
City Clerk

First reading: July 16, 1973

Second Reading: August 6, 1973

Adopted: August 6, 1973

Published: August 15, 1973